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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALEXANDER  
RIVERA,

Defendant and Appellant.

B285951

(Los Angeles County  
Super. Ct. No. GA089208)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Donald G. Umhofer, Judge. Affirmed.

William L. Heyman, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant  
Attorney General, Kenneth C. Byrne and Nicholas J. Webster,  
Deputy Attorneys General, for Plaintiff and Respondent.

Michael Alexander Rivera was convicted by a jury of second degree robbery. Although the court found at a bifurcated bench trial that Rivera had suffered three prior strike convictions, it dismissed all three for sentencing purposes under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and sentenced Rivera to 18 years in state prison: the middle term of three years for second degree robbery, plus three five-year enhancements for Rivera's prior serious felony convictions pursuant to Penal Code section 667, subdivision (a).<sup>1</sup> Rivera appealed the judgment, contending the trial court erred in imposing three, rather than one, prior serious felony enhancements. The People conceded the error, and we vacated Rivera's sentence and remanded the matter to allow the trial court to reconsider all lawful sentencing options.

At Rivera's resentencing hearing the trial court revisited its *Romero* ruling, dismissed only two of Rivera's three prior strike convictions and sentenced Rivera to 15 years in state prison: the upper term of five years for second degree robbery, doubled pursuant to the three strikes law, plus a consecutive five-year enhancement under section 667, subdivision (a)(1).

On appeal Rivera contends the trial court abused its discretion by dismissing only two of his three prior strike convictions and argues his sentence should be reduced to 10 years. Although we disagree with Rivera's argument, we remand the matter to allow the trial court to consider whether to dismiss or strike a one-year prior prison term enhancement under section 667.5, subdivision (b), that the court had stayed in Rivera's original sentence or the five-year prior serious felony

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<sup>1</sup> Statutory references are to this code.

enhancement under the recent amendments to section 667, subdivision (a)(1), and section 1385.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. *Rivera's Second Degree Robbery Conviction and Original Sentencing***

On March 13, 2013 Rivera took a laptop computer from a dance studio. The owner of the computer followed Rivera outside and confronted him. Rivera punched the computer's owner in the face, knocked him to the ground, kicked him and then fled. The police located Rivera, recovered the computer and arrested him. A jury found him guilty of second degree robbery (§ 211).

At a bifurcated trial following the jury's verdict, the court found Rivera had suffered three prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and three prior serious felony convictions within the meaning of section 667, subdivision (a)(1). All three of the prior felony convictions were from the same case. The trial court also found Rivera had served one prior prison term within the meaning of section 667.5, subdivision (b).

At Rivera's request the court dismissed the three prior strike convictions pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497 and imposed an 18-year state prison sentence: the middle term of three years for second degree robbery, plus three five-year enhancements for the three prior serious felony convictions. The trial court stayed the one-year prior prison term enhancement.

### **2. *Rivera's First Appeal***

In his first appeal Rivera argued the trial court erred in imposing three five-year prior serious felony enhancements. The People conceded the error, and we agreed. In an unpublished

opinion (*People v. Rivera* (Sept. 11, 2017, B270567)), we explained section 667, subdivision (a)(1), authorizes multiple five-year enhancements only for prior serious felony convictions based on charges brought and tried separately. Because Rivera’s three prior felony convictions were charged together and adjudicated in the same proceeding, the trial court erred in imposing more than one five-year enhancement. However, rather than simply directing the trial court to dismiss the two erroneously imposed enhancements, as Rivera requested, because the trial court’s ruling dismissing the three prior strike convictions was based, in part, on its erroneous assumption Rivera would “be significantly punished by the addition of 15 years of enhancement to the base term,” we vacated the sentence and remanded the case to the trial court to allow it to reconsider the full range of permissive sentencing options.

### 3. *The Trial Court’s Resentencing of Rivera After Remand*

Rivera represented himself at the resentencing hearing on October 24, 2017. The trial court reconsidered its *Romero* ruling and dismissed two of the three prior strike convictions based on its evaluation of a number of mitigating and aggravating factors: the crimes on which the prior strike convictions were based occurred in a single aberrant period of six days; as a result of his drug abuse Rivera was diagnosed with brain damage to his right hemisphere, causing poor judgment and cognitive rigidity; the current offense was a crime of opportunity because Rivera happened to be passing by the studio, saw the computer and took it; although the offense began as petty theft of a laptop computer, Rivera escalated the offense by his refusal to return the computer and by his use of force against the victim to retain the item; and although, unlike his prior period of criminal activity, Rivera’s

most recent offense did not involve the use of a knife or any other weapon, the victim was nevertheless injured by Rivera's use of force against him. The trial court selected the upper five-year term because Rivera was on parole at the time he committed robbery, had only been out of prison for seven months and had caused injury to the victim.

The trial court sentenced Rivera to an aggregate term of 15 years in state prison: the upper term of five years for robbery, doubled under the three strikes law, plus one five-year enhancement pursuant to section 667, subdivision (a)(1). The court omitted any reference to the one-year prior prison term enhancement under section 667.5, subdivision (b).

## DISCUSSION

### 1. *Governing Law*

Section 1385, subdivision (a), authorizes a trial court to dismiss a prior strike conviction "in furtherance of justice." (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A "strong presumption" exists that any sentence conforming to the sentencing norms

established by the three strikes law is “both rational and proper.” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

The trial court’s decision not to dismiss a prior strike is subject to review for abuse of discretion (*In re Large* (2007) 41 Cal.4th 538, 550)—that is, the party challenging the sentence must show the trial court’s decision “is so irrational or arbitrary that no reasonable person could agree with it” (*People v. Carmony, supra*, 33 Cal.4th at p. 377). “Where the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance.’” (*Id.* at p. 378.)

2. *The Trial Court Did Not Abuse Its Discretion in Dismissing Only Two of Rivera’s Three Prior Strikes*

The trial court’s decision on remand to dismiss only two of Rivera’s three prior strike convictions constituted a proper exercise of its discretion. Rivera’s contention the trial court considered only mitigating factors is belied by the record, which shows the trial court weighed the relevant facts, including both mitigating and aggravating circumstances, and reached a decision in full conformity with the spirit of the three strikes law. In particular, the court noted that Rivera had used a knife more than once during his prior period of criminality (see *People v. Williams, supra*, 17 Cal.4th at p. 161 [nature and circumstances of a defendant’s prior serious and/or violent felony convictions are to be considered in deciding whether to dismiss a prior strike]) and emphasized that in committing the current offense Rivera had escalated a petty theft into a crime of violence by using force and injuring the victim. (See *People v. Garcia* (1999) 20 Cal.4th

490, 499 [“A court might . . . be justified in striking prior conviction allegations with respect to a relatively minor current felony, while considering those prior convictions with respect to a serious or violent current felony”]; see also Cal. Rules of Court, rule 4.421(b)(1) [defendant’s engaging in violent conduct as a circumstance in aggravation].)

Rivera contends his use of violence in committing the current offense was reflected in the court’s decision to impose the upper five-year term for robbery and should not have been considered again as a ground for refusing to dismiss all three prior strike convictions. Whatever merit that argument may have in other circumstances, here the trial court’s decision to impose the upper term was sufficiently supported by the fact Rivera was on parole at the time he committed the current offense and had only been out of prison for seven months. (See *People v. Hall* (1994) 8 Cal.4th 950, 954-955, 963-964 [trial court properly selected the upper term based upon the aggravating fact the defendant was on parole at the time he committed robbery]; *People v. Yim* (2007) 152 Cal.App.4th 366, 369 [a “single aggravating factor may support a sentencing choice”; trial court did not err in selecting upper term sentence based on defendant’s parole status and unsatisfactory performance on parole].) There was no improper dual use of the fact of violence during the current offense.

Pointing out that at the original sentencing hearing the trial court had found sufficient reason to dismiss all three of his prior strike convictions, Rivera argues the trial court failed to explain any change in circumstance justifying its current decision to dismiss only two of the prior strikes. Rivera ignores the fact that his original sentence erroneously included three five-year

prior serious felony enhancements. As this court effectively determined when we remanded the case for resentencing after Rivera's first appeal, the trial court could properly decide dismissal of all three prior strike convictions was no longer justified once only one five-year section 667, subdivision (a), enhancement was imposed.

Finally, Rivera's reliance on mitigating circumstances (that Rivera's prior felonies occurred in a single brief period; his drug addiction led to brain damage affecting his judgment; and the current offense was a crime of opportunity) to offset the aggravating factors merely shows one way to balance the relevant facts and fails to demonstrate the trial court's decision was so irrational or arbitrary that no reasonable person could agree with it.

### *3. A Limited Remand Is Appropriate*

As discussed, Rivera was found to have served one prior prison term within the meaning of section 667.5, subdivision (b). The court stayed this enhancement when originally sentencing Rivera but, as the People note, did not address it when resentencing him. Because the trial court imposed the 15-year sentence recommended by the People, the Attorney General requests we amend the judgment to reflect the one-year prior prison term enhancement remains stayed.

The Attorney General's request would create an unlawful sentence. For the same prior offense, the trial court cannot impose both the five-year enhancement for a prior serious felony conviction under section 667, subdivision (a), and the one-year enhancement for a prior prison term under section 667.5, subdivision (b). (*People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153.) The greater enhancement must be imposed (*ibid.*), and



the lesser enhancement stayed (*People v. Brewer* (2014) 225 Cal.App.4th 98, 105-106 [where more than one enhancement cannot be imposed for the same prior prison term, the lesser enhancement(s) must be stayed]). Thus, when it originally imposed (albeit incorrectly) three prior serious felony enhancements, the trial court properly stayed the one-year enhancement for the prior prison term Rivera served for those convictions. However, if the prison term is attributable to a felony for which no prior serious felony enhancement is imposed, the section 667.5, subdivision (b), enhancement for that prison term must be imposed or stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 “[o]nce the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken”]; see *Brewer*, at p. 104 “[t]he trial court has no authority to stay an enhancement, rather than strike it . . . when the only basis for doing either is its own discretionary sense of justice”]; Cal. Rules of Court, rule 4.447(b) [while a court may strike an enhancement, it may not stay an enhancement unless an unlawful sentence results].) Accordingly, once we vacated the three section 667, subdivision (a), enhancements and the trial court at resentencing imposed only one of those enhancements, the lesser one-year prior prison term enhancement was no longer prohibited and could not be stayed. (See *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1670-1671 [trial court may impose the section 667, subdivision (a), enhancement for one prior conviction and the section 667.5, subdivision (b), enhancement for a different prior offense, even if the convictions occurred at the same time and the sentences were served together].)

Although the trial court had authority to strike, as opposed to stay, the section 667.5, subdivision (b), enhancement, we cannot conclusively determine from the record the trial court intended to exercise its discretion to do so. It did not state on the record its reasons for not imposing the prior prison term enhancement, as required if that was its intention. (See § 1385, subd. (a); *People v. Bonnetta* (2009) 46 Cal.4th 143, 150 [neither trial nor appellate courts have authority to disregard requirement for stating reasons for section 1385 dismissal].) Remand is thus appropriate for the trial court to exercise its discretion whether to dismiss or strike the section 667.5, subdivision (b), enhancement.

Because we must remand in any event, we also remand for the trial court to consider whether to strike or dismiss the five-year section 667, subdivision (a), prior serious felony enhancement pursuant to the recently enacted amendments to that provision and to section 1385, effective January 1, 2019 (see Stats. 2018, ch. 1013, §§ 1 & 2), which give the court discretion not to impose this formerly mandatory enhancement. We do so even though we recognize it is highly unlikely the court, which selected the upper five-year term for second degree robbery and declined on resentencing to dismiss all three prior strike convictions, will elect to utilize that discretion and dismiss the enhancement. But there is no reason under the circumstances here not to permit that decision to be made in the first instance by the trial court.

## **DISPOSITION**

We remand the matter for the limited purpose of allowing the trial court to consider whether to impose or strike the section 667.5, subdivision (b), prior prison term enhancement and whether to dismiss the prior serious felony enhancement under section 667, subdivision (a). In all other respects the judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.